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South Carolina Coastal Council

Freshwater Wetland Policy

Selected Information and Correspondence
(to include nationwide permits for Section 404)

QH 87.3 .S6 S68 1988

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

SOUTH CAROLINA COASTAL COUNCIL

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John C. Hayes, III
Chairman

H. Wayne Beam, Ph.D.
Executive Director

MEMORANDUM

TO: Wayne Beam

FROM: Steve Snyder

DATE: February 29, 1988

SUBJECT: Coastal Council policy regarding freshwater wetlands

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Policies for projects impacting freshwater wetlands in the coastal zone are found in the South Carolina Coastal Zone Management Program. Specific wetland resource policies exist for residential, commercial, industrial, and other development projects (see attached listing of policies dealing with wetland development); however, the underlying policy can be summarized as follows:

> Project proposals which would require fill or other significant permanent alteration of a productive freshwater wetland will not be approved unless no feasible alternative exists or an overridding public interest can be demonstrated, and any substantial environmental impacts can be minimized.

This policy applies to all projects requiring a direct South Carolina Coastal Council permit and all projects within the eight-county coastal zone requiring Coastal Council certification of any state or federal permit.

The resource policies do not distinguish between wetland types; however, the Coastal Zone Management Program specifically lists the following as coastal wetland resources: salt marsh, brackish and freshwater marsh, coastal impoundments, mud and sand flats, oyster reefs, swamps and bottom lands, savannahs, pocosins, and Carolina bays (Chapter I, C.1.). A further break down is made between alluvial wetlands (bottomland flood plains) and non-alluvial wetlands (inland groundwater-fed wetlands) (Chapter I, C.1.f.), with both types catagorized collectively as "swamps and bottomlands" and both types providing similar functions. In addition, three of the wetland types (savannah, pocosins, and Carolina bays) are generally non-alluvial isolated wetlands.

Wetlands of the type listed above have been specifically determined by the S. C. Coastal Zone Management Plan to be of "such long range, comprehensive importance as to be in the national interest" (Chapter III, C.1., p. III-5) and are intentially "reflected throughout all the Resource Policies, which provide strong protection against unwarranted dredging, filling or other permanent alteration of salt, brackish and freshwater wetlands" (Chapter III, e.1, p. III-7).

The resource policies are clear and provide little flexibility. The staff and the Management Committee have worked together over the past two years to establish precedence for implementation of wetland policy. The committee and therefore the staff have allowed wetland impacts only under the terms of the policy. The only exceptions are development of storm water management systems in wetlands where no other alternatives are feasible and in those cases where the wetland area is extremely small and isolated (for example, less than 0.2 acres). Mitigation has been required in all but the smallest of projects.

mks0373D/(86/87)

cc: Mr. Christopher L. Brooks

FRESHWATER WETLAND DEVELOPMENT
SELECTED POLICIES
SOUTH CAROLINA COASTAL ZONE MANAGEMENT PROGRAM

(Chapter III, Policy Section I. (1)(b)). Residential development which would require filling or other permanent alteration of salt, brackish or freshwater wetlands will be prohibited, unless no feasible alternatives exist or an overriding public interest can be demonstrated, and any substantial environmental damage can be minimized. These marshes are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for absorption of storm water runoff and aquifer recharge, and therefore, their destruction for residential purposes must be avoided whenever possible. (p. III-16).

(Chapter III, Policy Section II. B. (1)(f)). Construction of private roadways for private access shall be aligned to avoid salt, brackish and freshwater wetlands wherever feasible, and, where applicable, must provide bridges, culverts or other means to maintain circulation and water flow. (p. III-22).

(Chapter III, Policy Section II. C. (1)(a)). To the extent feasible, new airport facilities shall not encroach into salt, brackish or freshwater wetlands. Permit applications involving dredge or fill to construct these facilities in wetland areas generally shall be denied, unless no feasible alternatives exist or an overriding public interest can be demonstrated, and any substantial environmental damage can be minimized. (p. III-24).

(Chapter III, Policy Section II. E. (1)(a)). The filling or other permanent alteration of productive salt, brackish or freshwater wetlands will be prohibited for purposes of parking unless no feasible alternatives exist, the facility is directly associated with a water-dependent activity, any substantial environmental impacts can be minimized, and an overriding public interest can be demonstrated. (p. III-27).

(Chapter III, Policy Section III. A. (1)(b)(ii)). Ditching for drainage from uplands shall avoid passing through productive wetlands to the maximum extent practicable. (p. III-30).

(Chapter III, Policy Section III. C. (1)(b)). Dredge or strip mining operations are prohibited in wetland areas, unless no feasible alternatives exist and the benefits of mining outweigh the adverse impacts. If all or part of a mining site must involve water bodies or wetland areas, policies for dredging (VIII (A) of the Resource Policies) shall apply. (p. III-32).

(Chapter III, Policy Section III. D. (1)(b)). The filling or other permanent alteration of productive fresh, brackish and saltwater wetland areas for manufacturing facilities and related activities or structures will be prohibited, unless no feasible alternatives exist and any substantial environmental impact can be minimized. To the extent feasible heavy industry shall be directed away from ecologically sensitive areas such as marshes, forested wetlands, pocosins, etc. (p. III-34).

(Chapter III, Policy Section IV. (1)(b)). Commercial proposals which require fill or other permanent alteration of salt, brackish or freshwater wetlands will be denied unless no feasible alternatives exist and the facility is water-dependent. Since these wetlands are valuable habitat for wildlife and plant species and serve as hydrologic buffers, providing for storm water runoff and aquifer recharge, commercial development is discouraged in these areas. The cumulative impacts of the commercial activity which exists or is likely to exist in the area will be considered. (p. III-40).

(Chapter III, Policy Section V. B. (1)(a)). Proposals which include the filling or other permanent alteration of productive salt, brackish or freshwater wetlands will not be approved unless no feasible alternatives exist. (p. III-44).

(Chapter III, Policy Section VII. A. (1)(a)). Activities deemed, by the South Carolina Coastal Council in consultation with the South Carolina Wildlife and Marine Resources Department, to have a significant negative impact on wildlife and fisheries resources, whether it be on the stocks themselves or their habitat, will not be approved unless overriding socio-economic considerations are involved. In reviewing permit applications relative to wildlife and fisheries resources, social and economic impacts as well as biological impacts will be considered. (p. III-51).

(Chapter III, Policy Section VIII. A. (1)(d)). Dredging for establishment of new canals which involves permanent alteration of valuable wetland habitats will be prohibited unless no feasible alternative exists or an overwhelming public interest can be demonstrated. Establishment of canals for purposes of creating waterfront lots from inland property, especially where dead-end canals would result, will be prohibited unless it can be demonstrated that there will be no significant environmental impacts. (p. III-55).

(Chapter III, Policy Section XII. E. (1)). Project proposals which would require fill or other significant permanent alteration of a productive freshwater marsh will not be approved unless no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impact can be minimized. (p. III-73).

SOURCE: DEVELOPERS HANDBOOK FOR FRESH-WATER WETLANDS, 1989

b. In the interest of protecting navigational safety, bridges spanning South Carolina navigable waters must provide adequate clearances for boating. These clearances are set by the South Carolina Water Resources Commission. A minimum of 6' vertical clearance and 10' horizontal clearance are required. However, greater clearances may be required under some circumstances.

c. In the interest of protecting navigational safety, structures in navigable waters must be constructed within certain limits (generally no more than one third the distance across the waterway).

d. In the interest of protecting the rights of adjacent riparian landowners, it is generally the policy of the South Carolina Water Resources Commission not to allow encroachment in front of adjacent lands by a permitted activity unless the permit applicant has obtained written permission from the affected party.

e. To further consider major project impacts it is highly recommended that a preapplication interagency conference be held for such proposed activities. Prospective applicants can be advised and guided by such meeting to assist in preproject planning that will meet the needs of the applicant and also protect the resource involved. This planning approach may be carried and continued through the permit review process. Project plans may be modified over the course of time to avoid or minimize adverse resource impacts. In certain specific circumstances a proposal by an applicant to replace or compensate for unavoidable detriments to South Carolina navigable waters may be considered by the South Carolina Water Resources Commission according to procedures established in the permit regulations.

9. Agency Contacts

Anyone planning to perform construction or alteration work in navigable waters of South Carolina or waterbodies of uncertain navigability status should contact the South Carolina Water Resources Commission prior to the initiation of any work. The South Carolina Water Resources Commission staff is available to answer questions on the permitting program, make jurisdictional determinationand provide applications for required permits. Individuals requesting additional information should contact the Permit Administrator, South Carolina Water Resources Commission, 1201 Main Street, suite 1100, Columbia, South Carolina 29201, phone A/C 803-737-0800.

C. SOUTH CAROLINA COASTAL COUNCIL

1. Coastal Zone Management Program Consistency Certification

South Carolina's Coastal Zone Management Act of 1977 (Act 123) defines the state's coastal zone as "all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas." The critical areas, all of which are salt water wetlands, fall under the S.C. Coastal Council's direct permitting authority. Freshwater wetlands, however, are given protection through the Council's regulatory authority known as certification. Through its certification process the Coastal Council reviews all activities requiring permits by other state agencies, as well as federal agencies, to

determine if the project is consistent with the Coastal Zone Management Program. In order to receive certification approval, an activity must be determined to be consistent with relevant policies contained in the S.C. Coastal Management Program, including the S. C. Coastal Council Storm Water Management Guidelines. These policies and guidelines are aimed at protecting freshwater wetland areas as well as the quality of our surface waters. Without Coastal Council certification, a permit for the particular activity in question cannot be issued by the permitting agency.

In summary the S. C. Coastal Council exerts an indirect regulatory authority over freshwater wetlands. A Coastal Council permit is not required for activities in freshwater wetlands; however, Coastal Council certification is mandatory whenever the permit of another state agency or a federal agency is required for a particular activity. The activity must be consistent with the Coastal Zone Management Plan.

2. Procedure

The certification process works as follows. When an individual wants to pursue an activity (e.g., construction of a dock, boat ramp, bulkhead; dredging in a wetland; mining in a wetland; placing fill in a wetland for commercial or housing development; impounding a wetland; construction of water supply lines or wastewater lines , etc.) which falls under the permitting authority of a state or federal agency, he must apply to the particular agency or agencies for a permit.The state or federal agency notifies the S. C. Coastal Council through a standard public notice or other type of notification (depending on the activity involved), and a review of the proposed activity is begun by Council staff.

After its review, which can involve review of site plans and/or site visits, the Council makes a decision on the project and notifies the permitting agency or agencies as well as the applicant of its determination. This determination will always be one of the following:

a. the project is consistent with the Coastal Zone Management Program,

b. the project is inconsistent with the Coastal Zone Management Program,

c. the project is inconsistent but can be made consistent by making certain identified modifications to the original plans.

In the instance of a large project/development where a problem (i.e., conflict with the S. C. Coastal Management Program policies) with certification is obvious at the beginning of its review, the staff will try to contact the applicant and make him aware of the problem(s) in order that modifications in plans may be discussed. Developers of large projects (e.g., commercial and/or housing developments) are encouraged to seek Coastal Council input early-on before application is made.

3. Basic Freshwater Wetland Policy

Policies for projects impacting freshwater wetlands in the coastal zone are found in the South Carolina Coastal Zone Management Program.

Specific wetland policies exist for residential, commercial, industrial, and other developmental projects; however, the underlying policy can be summarized as follows:

Project proposals which would require fill or other significant permanent alteration of a productive freshwater wetland will not be approved unless: no feasible alternative exists or an overriding public interest can be demonstrated, and any substantial environmental impacts can be minimized.

This policy applies to all projects requiring a direct South Carolina Coastal Council permit and all projects within the eight-county coastal zone requiring Coastal Council certification of any other state or federal permit.

The most basic advice to developers of land containing freshwater wetlands is to avoid them. Encroachment (filling, dredging, ditching, impounding) into wetlands will only be allowed in limited circumstances as defined under the Coastal Zone Management Program. Exceptions are discussed in the following sections on storm water management and wetland master planning.

4. Developing Storm Water Management Systems in Freshwater Wetlands

Many projects within the coastal zone will be located within or adjacent to freshwater wetlands. These wetlands are natural filters and can often be utilized as receiving areas for storm water runoff. Therefore, these wetland systems, when combined with other storm water best management practices, can frequently be incorporated into the overall drainage plan. The Council does not support the wholesale conversion of natural wetlands into lagoon or lake systems, but will approve the use of these areas in their natural state or with necessary alterations as part of the storm water management system.

When using freshwater wetlands in the storm water management system, a well-planned effort is required to avoid any potential damage to the natural resource. The system should include a variety of individual best management practices that work together to achieve the desired results. For example, a pre-treatment lake located in high ground adjacent to a wetland can reduce sediment loads, remove oils and greases and attenuate storm water volumes. Also grassed swales could be used to collect and convey storm water to a distribution system (spreader swale, overflow berm, riprap discharge structure, etc.) to ensure sheetflow of storm water through the wetland. This provides for greater contact of the storm water with the vegetation of the wetland and ensures a longer residence time within the wetland. All projects using wetlands in their storm water design must incorporate an extensive sediment and erosion control plan during construction. The entire wetland area needs to be protected against any potential sediment intrusion. In addition, all projects of this type should include a mechanism to minimize the amounts of oils and greases entering the wetlands.

The following guidelines will be used in evaluating such systems:

a. When freshwater wetlands are involved in a project site, the

following order of design priorities will be used for storm water systems:

(1) Avoid the wetlands, use highground alternatives (i.e., ponds, swales, etc).
(2) Use wetlands in their natural state.
  (a) For low density residential, sheetflow storm water over grassed area into wetlands using other best management practices as appropriate.
  (b) For all other development, the general storm water management guidelines must be met prior to release into wetlands.
  (c) Manage water levels to maintain the hydrology of the natural wetland.
(3) Excavate storage requirements out of immediately adjacent highground and overflow into the wetland area for additional treatment.
(4) In special cases where the above alternatives are impractical, the Council staff will coordinate with the applicant to identify alternatives.

b. Where natural wetland values are lost due to digging adjacent to or in freshwater wetlands, a combination of the following design criteria will apply to help replace some of the lost values:

(1) Construct submerged 10:1 shelves, 10 - 15 feet wide, around a portion or portions of the storm water pond for emergent vegetation (slope and width can vary to meet the particular situation). Consult with Council staff biologist for depth of shelf.
(2) Leave islands or peninsulas of natural wetland vegetation.
(3) Leave 25 - 50 feet wide upland buffer of natural vegetation around a portion or portions of the storm water pond for a transitional zone.
(4) Design the water level management system to maintain wetland values.
(5) Consider the need for revegetation of created or disturbed wetlands.

5. Wetland Master Planning Guidelines

The Coastal Council, in conjunction with other state and federal agencies involved in wetland review, encourages a comprehensive approach to wetland management. To promote such an approach, the Council has utilized a "wetland master planning" concept. Simply stated, the guidelines are as follows:

If a pre-development wetland master plan is prepared for a project, identifying all wetlands, drainage patterns and conceptual development, isolated freshwater wetlands of one (1) acre or less in size may be incorporated into the project development as necessary provided:

1. the wetlands contain no endangered species or critical habitat, and
2. the wetland losses are adequately mitigated.

The wetland master plan must be certified by the Coastal

SOURCE: DEVELOPER'S HANDBOOK FOR FRESH-WATER WETLANDS

Council with input from other reviewing agencies as necessary.

6. Agency Contact

For information regarding Coastal Council certification of projects containing freshwater wetlands contact:

Planning and Certification Division
South Carolina Coastal Council
4280 Executive Place North, Suite 300
Charleston, S. C. 29405
Telephone: A/C 803-744-5838

D. SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

1. Procedures

a. Application Process

The 401 Water Quality Certification procedure formally begins after the Corps of Engineers reviews each Corps application, determines that Water Quality Certification, pursuant to Section 401 of the Clean Water Act, is required from the Department of Health and Environmental Control (DHEC), and issues a joint public notice advertising the application. The public notice states that it constitutes a request on behalf of the applicant for 401 Certification from DHEC. Formal review of the application begins upon receipt by DHEC of the Corps public notice.

b. Review and Public Notice Process

Written comments submitted during the designated comment period in each joint public notice are reviewed and considered by DHEC staff. The DHEC staff may request additional information from the applicant any time during the review process but preferably immediately upon receipt and review of the public notice. After the public comment period and review of all available information, DHEC staff prepares a staff assessment considering all application materials, supporting documentation, and other comments. DHEC staff will generally complete their assessment within 15 days after the public notice comment period ends. The Department then issues a public notice of its own which identifies the proposed project, summaries the information in the application package, gives the location where the assessment and related files may be reviewed, announces the Department is prepared to make a certification decision, and issues notice of time and place for a Section 401 public hearing. The hearing is held on every application for certification.

c. Section 401 Public Hearing

The public hearing are generally consolidated hearings where several applications are considered. The hearings are usually conducted by a Department staff member who is a designee of the Board. The public hearings are conducted after proper notice and at the time and place directed by the hearing officer. The proceedings are recorded and transcribed. The record of the hearing remains open for 15 calendar days to receive rebuttal or supplemental information from the participants. The final record includes a verbatim hearing transcript with all exhibits.

VII. WETLAND MASTER PLANNING

The Coastal Council, in conjunction with other state and federal agencies involved in wetland review, encourages a comprehensive approach to wetland management. To promote such an approach, the Council has utilized a "wetland master planning" concept. Simply stated, the guidelines are as follows:

If a pre-development wetland master plan is prepared for a project identifing all wetlands, drainage patterns and conceptual development pattern, isolated freshwater wetlands of one (1) acre or less in size may be incorporated into the project development as necessary provided:

1. the wetlands contain no endangered species or critical habitat, and
2. the wetland losses are adequately mitigated.

The wetland master plan must be certified by the Coastal Council with input from other reviewing agencies as necessary.

VIII. GENERAL GUIDANCE

The following do's and don'ts are not conclusive but experience has shown that without adherence to these concepts substantial project delays can be anticipated.

A. Development Do's and Don'ts

DO'S

1. Avoid all encroachments into wetlands.
2. Minimize any impacts that cannot be avoided.
3. Incorporate wetlands in their natural state as part of a project's storm water management plan.
4. Get agency input by attending South Carolina Coastal Council interagency meeting before initiating a new project.
5. Include all phases of a development when submitting a plan for public review.The intended use for all wetlands on-site should be included.
6. Fully incorporate the freshwater wetlands into the master plan.
7. Incorporate buffer zones around preserved wetlands."

DON'TS

1. Don't finalize development plans before addressing site wetlands.
2. Don't purchase property until investigating amount of wetlands on site.
3. Don't proceed with project plans using consultant's wetland delineation. Always verify lines with Corps of Engineers first.
4. Don't submit development plans in a piecemeal fashion.
5. Don't submit mitigation plans until all other options are exhausted and wetlands impacts have been minimized to the greatest extent possible.
6. Don't plan extensive canals through freshwater wetlands to create waterfront lots or water access.

7. Don't excavate freshwater wetlands to create lakes or ponds.
8. Don't dam off flowing streams to create open water ponds.
9. Don't fill freshwater wetlands to create residential or commerical lots.
10. Don't undertake any project without first obtaining all necessary permits or certifications.

B. Planning Approach

In the early planning processes of developing a conceptual master plan for a development, either commerical or residential, careful consideration should be given to freshwater wetlands. In developing the master plan, the three considerations discussed below must be employed if a project is to proceed in an orderly and timely manner.

1. Avoidance
In developing a layout for a parcel or tract of land containing freshwater wetlands every effort should be made to avoid encroachments into these areas. A well planned development can capitalize on the presence of the wetlands by utilizing them in their natural state for storm water management, or as open space, green areas or natural areas. Wetlands can be a selling point for the development from both an aesthetic and an environmental viewpoint. While specific data is not available the general public are much more environmentally conscious than ever before. Thus, avoiding wetlands can enhance your development and allow the project to proceed unencumbered by the permitting process.

2. Minimization
If the wetlands located on the tract cannot be avoided, then every effort must be made to minimize encroachments into these areas. Early planning is always the key to minimizing impacts on the aquatic resource. The wetlands can be used for storm water management in either their natural state, as mentioned above, or by excavating a portion of the wetlands to increase the volume needed for retention. Minimization can be attained in a number of fashions but is generally considered to have occurred when the discharges are held to the minimum necessary to achieve a project purpose. Examples of minimization include but are not limited to:
a. obtaining access to the property through wetlands only when no highland access is available,
b. bridging all or a portion of the wetlands,
c. providing steeper side slopes for access fills,
d. providing a single access rather than multiple accesses,
e. confining the development to the highland areas with only minor encroachments to shape the land.

Minimization of project encroachments into wetlands can significantly shorten the time required to obtain authorization for the project under nationwide permit #26 or under an individual permit.

3. Compensation
Compensation for wetlands impacted by a project should be a consideration for developers from the early steps of planning even though it is not always required. If the project encroachments are

necessary to fulfill the intent of the project, the project is water dependent, and no other alternative sites or methods are available that would have lesser impacts on the aquatic resource, compensation may not be required. However, when encroachments cause impacts on wetlands beyond those absolutely necessary to accomplish the intent of the project, compensation will be required to offset the losses resulting from those encroachments. Compensation can take many forms. Some forms of compensation are as follows:

a. creation of vegetated wetlands. This is not always accomplished on a 1:1 ratio. In some instances the ratio can vary from the 1:1 to as much as 5:1. That is to say 5 acres for every acre impacted by the project.

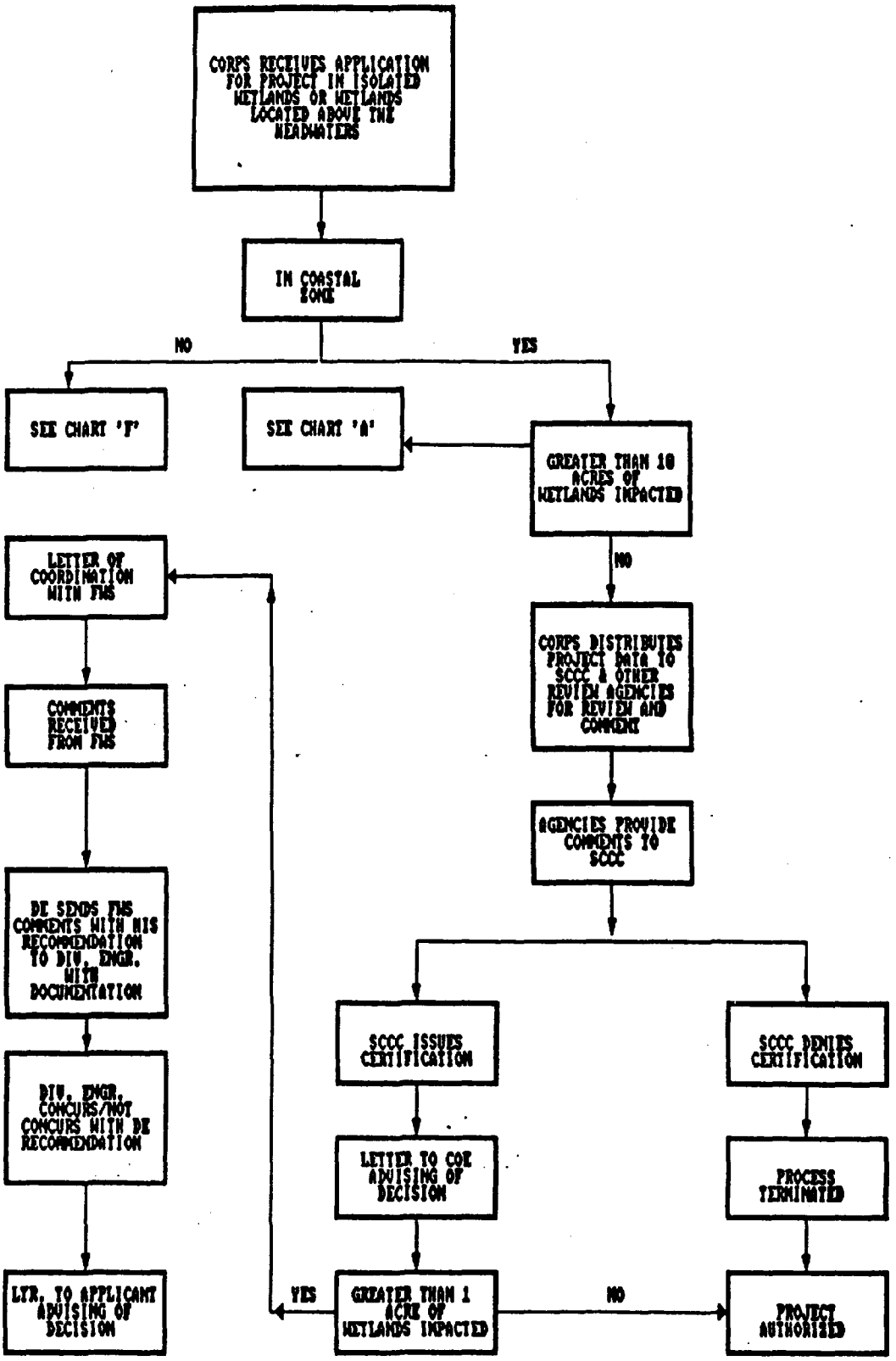
b. restoration and/or enhancement of significantly impaired wetlands.

c. dedication of lands to an appropriate entity with provisions that require them to be preserved in their natural state in perpetuity.

A willingness to compensate for wetland impacts does not necessarily mean that a permit will be granted. First and foremost, a project must be found to be consistent with the 404(b)(1) Guidelines. In addition, a project must be determined to be "not contrary to the public interest". To reach these conclusions all efforts must have been made to avoid and/or minimize wetland encroachment/alterations. Compensation may be used to tip the public interest scales to the positive side and may also be used to influence a finding of compliance with the 404(b)(1) Guidelines.

FLOW CHART 'E'

NATIONWIDE PERMIT 26 - PROCESS IN THE COASTAL ZONE



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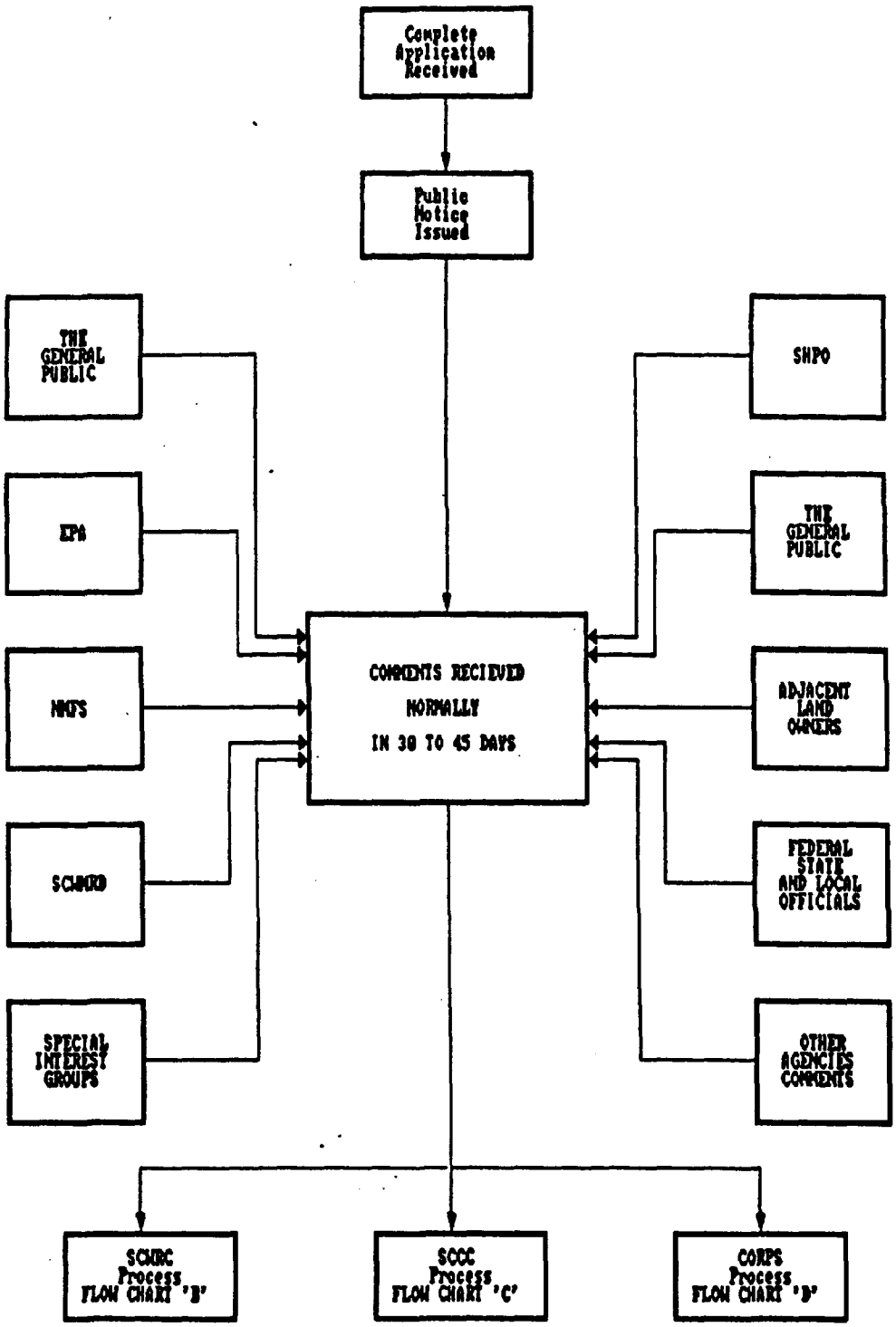
INDIVIDUAL PERMIT PROCESS FOR FRESHWATER WETLANDS



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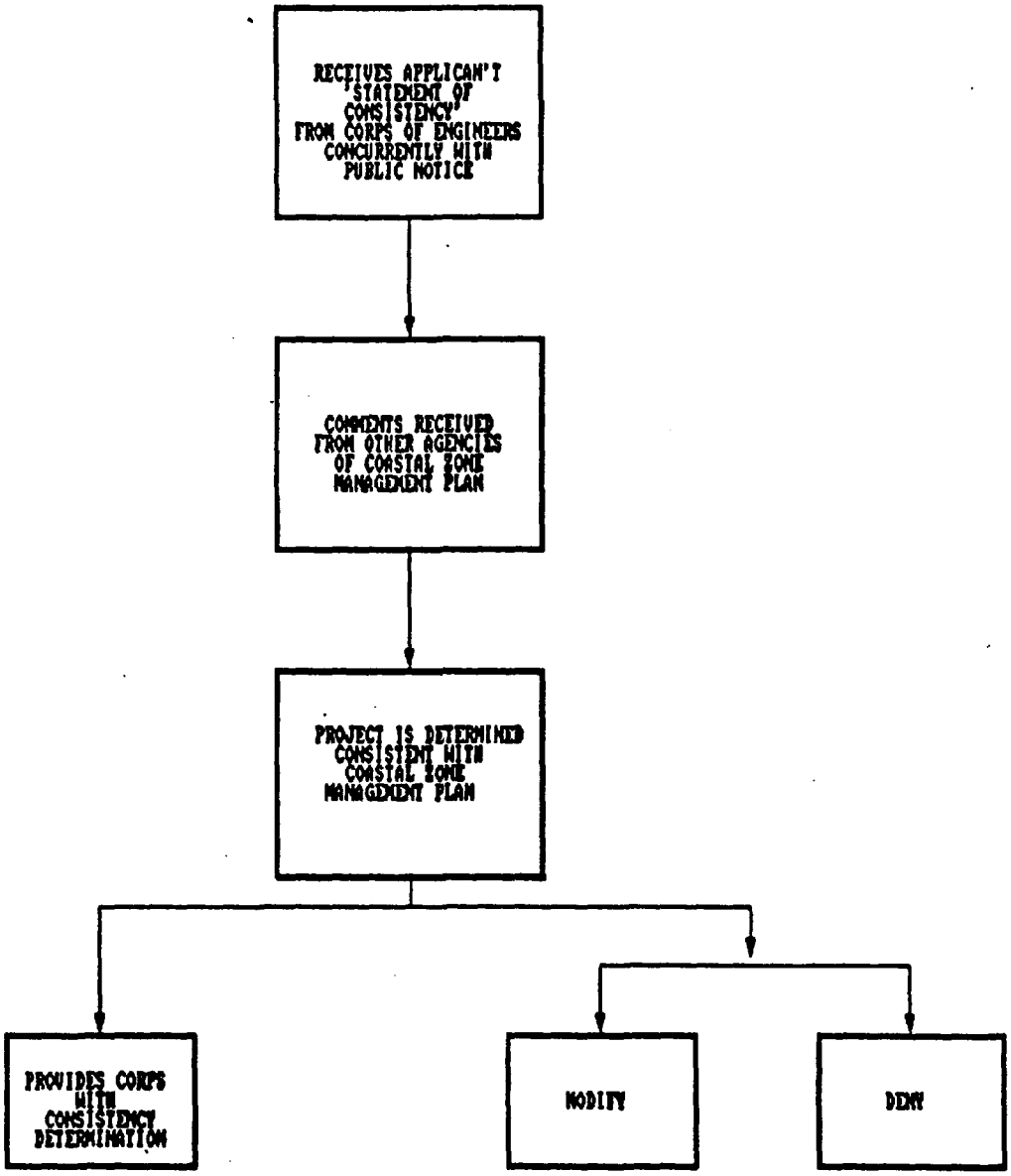
S. C. COASTAL COUNCIL CERTIFICATION PROCESS FOR FRESHWATER WETLANDS



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as M. Waddell, Jr.
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Wayne Beam, Ph.D.
xecutive Director

June 23, 1986

Robert K. Dawson
U.S. Army Corps of Engineers
Room 2E
570 Pentagon
Washington, D.C. 20310

Dear Mr. Dawson:

The South Carolina Coastal Council and the Charleston District Corps of Engineers have been negotiating over the Section 404 Permit Program and the nationwide permits promulgated by the Corps of Engineers. We have been attempting to resolve the objection of the South Carolina Coastal Council to Nationwide Permit No. 26. As a result of these negotiations, the Coastal Council now submits the following Federal consistency determination to replace the one originally submitted.

> "The South Carolina Coastal Council maintains its position that Nationwide Permit No. 26 (33CFR330.5(a)(26)) is not consistent with the South Carolina Coastal Management Program since it would allow the filling or other alteration of wetlands in contravention of program policies found in chapters III. and IV. Specifically, these policies are found in chapter III. C. 3, Resource Policies, Sections I. 1(b); II. B. 1(a); II. E. 1(a); III. C. 1(b); III. D. 1(b); III. E. 1(c); IV. 1(b); V. B. 1(a); VIII. B. 1(a); IX. A. 1(c); IX. B. 1(b); IX. C 1(b); IX. E. 1(d); and XII. E. 1. However, the Coastal Council would certify a regional condition or modification that would provide that an individual certification from the Coastal Council is required for all projects involving 10 acres or less of wetlands which are in the coastal zone of South Carolina."

The Charleston District and the South Carolina Coastal Council have agreed upon procedures to implement both programs in a cooperative fashion. I would like to commend the Charleston District personnel for their efforts and time in reaching the agreement in regard to this nationwide permit. We believe that the agreed upon procedure and this change in our

consistency statement will be to the benefit of the general public and to both of our regulatory programs.

Sincerely,

H. Wayne Beam

H. Wayne Beam
Executive Director

HWB:0235A1jb

cc: Senator James M. Waddell, Jr., Chairman
Christopher L. Brooks, Deputy Director
Newman J. Smith, Staff Attorney
Lt. Col. F. L. Smith, Jr., Charleston District Corps
Peter Tweedt, Asst. Administrator, OCRM
Joe Uravitch, Regional Manager, OCRM

Nationwide Permit #26 allows fill of all less than 1 acre wetlands and some 1 - 10 acre wetlands. The filling of freshwater wetlands is inconsistent with the policies of the South Carolina Coastal Management Program. Therefore, the Coastal Council denied federal consistency certification of Nationwide Permit #26. This means that all proposals to fill freshwater wetlands under the Corps' jurisdiction must go through the regular 404 Permit process. Nationwide Permit #26 is not effective in South Carolina's coastal zone. Only wetlands less than 10 acres are affected.

The Corps and the Coastal Council have negotiated a possible way of proceeding that would allow for Coastal Council review of these fill proposals while streamlining the process. The Corps could issue a modification of Nationwide Permit #26 that would require Coastal Council review and certification prior to Corps authorization for any fill. If the Coastal Council found a proposal consistent, the applicant could proceed under Nationwide Permit #26. If the Coastal Council found a proposal to be inconsistent, then a full application and review would be required. This procedure would mean that an application for a fill would not be required in all cases. The existing Pre-Discharge Notice in the Corps rules could be used rather than an application for all proposals impacting 10 acres or less. Only if the Coastal Council finds the proposal to be inconsistent would a full application and review be required. The Fish and Wildlife Service would also review

the Pre-Discharge Notices, but because the negotiated procedures replaced the strict time requirements of the Corps' rule the Fish and Wildlife Service would have more than 3 weeks to complete their review.

NJS:0248A1jb

South Carolina Coastal Council

James M. Waddell, Jr.
Chairman

H. Wayne Beam, Ph.D
Executive Director

June 20, 1984

C. E. Edgar, III
Brigadier General, U. S. Army
Deputy Director Civil Works
Department of the Army
Office of the Chief of Engineers
Washington, D.C. 20314

Dear Brigadier General Edgar:

The S. C. Coastal Council hereby submits its final position on the nationwide permits referred to in your letter of April 9, 1984.

1. Since the Coastal Council must issue its own permit for any activity covered by the nationwide permits in the critical areas of South Carolina's coastal zone, the nationwide permits are found to be consistent with the S. C. Coastal Management Program as they apply to any of such activities in the critical areas of the coastal zone.

2. For areas of the coastal zone outside of the critical areas the following nationwide permits are certified to be consistent with the S. C. Coastal Management Program: 33.5(a)(1), (2), (3), (4), (5), (6), (7), (9), (10), (11), (13), (15), (17), (20), (21), (22), (24) and (25).

3. For areas of the coastal zone outside of the critical areas the following nationwide permits are certified provided the indicated provisions are complied with:

330.5(a)(8) - provided such structures are approved by the Coastal Council in an Exploration or Development Plan pursuant to 15 CFR 930.

330.5(a)(12) - provided that the affected area be sealed to prevent sedimentation and turbidity in adjacent areas by the use of silt curtains or other methods; and that shellfish and other indigenous organisms are protected from the detrimental effects of such activities.

330.(5)(a)(14) - provided that fill associated with such permitted activities will not restrict the normal flow of waters on any side of the activity or an adjacent area.

330.(5)(a)(16) - provided that the conditions of the S. C. Department of Health and Environmental Control are complied with for any such activity.

4. For areas of the coastal zone outside of the critical areas the following nationwide permits are found to be inconsistent with the S. C. Coastal Management Program and any activities that would otherwise come under these nationwide permits must be certified as being consistent with the S. C. Coastal Management Program on an individual case by case basis:

330.(5)(a)(18), (19), (23) and (26).

Thank you for the opportunity to review these nationwide permits. The cooperation of the U. S. Corps of Engineers in implementing the S. C. Coastal Management Program is appreciated.

Sincerely,

H. Wayne Beam

H. Wayne Beam
Executive Director

HWB:dms/0015d

cc: Senator James M. Waddell, Jr.

Engineer, as described above.
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which indicates that a final
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finding should be forwarded to the Division Engineer; changes are not considered final until a determination has been made by the Division Engineer.

PART 330—NATIONWIDE PERMITS

Sec.

AUTHORITY: 33 U.S.C. 403; 33 U.S.C. 1344.

SOURCE: 47 FR 31831, July 22, 1982, unless otherwise noted.

§ 330.1 General.

The purpose of this regulation is to describe the Department of the Army's nationwide permit program and to list all current nationwide permits which have been issued by publication herein. The two types of general permits are referred to as "nationwide permits" and "regional permits." A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation. The authority for general permits to be issued by district engineers on a regional basis is contained in 33 CFR Part 325. Copies of regional permits can be obtained from the appropriate district engineer. Nationwide permits are designed to allow the work to occur with little, if any, delay or paperwork. However, the nationwide permits are valid only if the conditions applicable to the nationwide permits are met. Just because a condition cannot be met does not necessarily mean the activity cannot be authorized but rather that the activity will have to be authorized by an individual or regional permit. Additionally, division engineers have the discretion, under situations and procedures described herein, to override the nationwide permit coverage and require an individual or regional permit. The nationwide permits are issued to satisfy the requirements of both Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act unless otherwise stated. These nationwide permits apply only to Department of the Army regulatory programs (other Federal agency, state and local authorizations may be required for the activity).

§ 330.2 Definitions.

(a) The definitions of 33 CFR Parts 321 through 329 are applicable to the terms used in this part.

(b) Discretionary authority means the authority delegated to division engineers in § 330.7 of this part to override provisions of nationwide permits to add regional conditions or to require individual permit applications.

§ 330.3 Nationwide permits for activities occurring before certain dates.

The following activities are permitted by a nationwide permit which was issued on 19 July 1977 and need not be further permitted:

(a) Discharges of dredged or fill material in waters of the United States outside the limits of navigable waters of the United States that occurred before the phase-in dates which began July 25, 1975, and extended Section 404 jurisdiction to *all* waters of the United States. These phase-in dates are: after July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands; after September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area; and after July 1, 1977, discharges into all waters of the United States.

(b) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer was not asserting jurisdiction at the time the activity occurred provided, in both instances, there is no interference with navigation.

§ 330.4 Public notice.

(a) *Chief of Engineers.* Upon proposed issuance of new nationwide permits, modification to, or reissuance of, existing nationwide permits, the Chief of Engineers will publish a notice in the FEDERAL REGISTER seeking public comments and including the opportu-

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nity for a public hearing. This notice will state the availability of information, at the Office of the Chief of Engineers and at all district offices, which reveals the Corps' provisional determination that the proposed activities comply with the requirements for issuance under general permit authority. The Chief of Engineers will prepare this information which will be supplemented, if appropriate, by division engineers.

(b) *District engineers.* Concurrent with publication in the FEDERAL REGISTER of new or reissued nationwide permits by the Chief of Engineers, district engineers will so notify the interested public within the district by an appropriate notice. The notice will include any applicable regional conditions adopted by the division engineer.

[49 FR 39483, Oct. 5, 1984]

§ 330.5 Nationwide permits.

(a) *Authorized activities.* The following activities, including discharges of dredged or fill material, are hereby permitted provided the conditions listed in paragraph (b) of this section and the notification procedures, where required, of § 330.7 are met. *Comment.* Because some states have denied water quality certification/coastal zone consistency for some nationwide permits reissued herein and many states have granted conditional water quality certification, applicants should check with the district engineer regarding eligibility under the nationwide permits.

(1) The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (33 CFR Part 66, Subchapter C).

(2) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.4(g)).

(3) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or fill or of any currently serviceable structure or fill constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation [1] from the plans of the original structure or fill, and further provided that the structure or fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction. Maintenance dredging is not authorized by this nationwide permit.

(4) Fish and wildlife harvesting devices and activities such as pound nets, crab traps, eel pots, lobster traps, duck blinds, clam and oyster digging.

(5) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures.

(6) Survey activities including core sampling, seismic exploratory operations, and plugging of seismic shot holes and other exploratory-type bore holes.

(7) Outfall structures and associated intake structures where the effluent from that outfall has been permitted under the National Pollutant Discharge Elimination System program (section 402 of the Clean Water Act) (see 40 CFR Part 122) provided that the district or division engineer makes a determination that the individual and cumulative adverse environmental effects of the structure itself are minimal in accordance with § 330.7 (c)(2) and (d). Intake structures *per se* are not included—only those directly associated with an outfall structure are covered by this nationwide permit.

(8) Structures for the exploration, production, and transport of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Land Management, provided those structures are not placed within the limits of any designated shipping safety fairway or traffic separation scheme (where such limits have not been designated or where changes are anticipated, District Engineers will consider recommending the discretionary authority provided by § 330.7 of

[1] Minor deviations due to changes in materials or construction techniques and which are necessary to make repair, rehabilitation, or replacement are permitted.

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this part), and further subject to the provisions of the fairway regulations in 33 CFR 209.135.

(9) Structures placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established by the U.S. Coast Guard.

(10) Non-commercial, single-boat, mooring buoys.

(11) Temporary buoys and markers placed for recreational use such as water skiing and boat racing provided that the buoy or marker is removed within 30 days after its use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually.

(12) Discharge of material for backfill or bedding for utility lines including outfall and intake structures provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line and outfall and intake structures will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322. See also paragraph (a)(7) of this section.)

(13) Bank stabilization activities provided:

(i) The bank stabilization activity is less than 500 feet in length;

(ii) The activity is necessary for erosion prevention;

(iii) The activity is limited to less than an average of one cubic yard per running foot placed along the bank within waters of the United States;

(iv) No material is placed in excess of the minimum needed for erosion protection;

(v) No material is placed in any wetland area;

(vi) No material is placed in any location or in any manner so as to impair surface water flow into or out of any wetland area;

(vii) Only clean material free of waste metal products, organic materials, unsightly debris, etc. is used; and

(viii) The activity is a single and complete project.

(14) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete project for crossing of a non-tidal waterbody, provided that the crossing is culverted, bridged or otherwise designed to prevent the restriction of and to withstand expected high flows [4] and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing will require a permit from the U.S. Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 301). Some road fills may be eligible for an exemption from the need for a Section 404 permit altogether (see 33 CFR 323.4).

(15) Fill placed incidental to the construction of bridges across navigable waters of the United States including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such fill has been authorized by the U.S. Coast Guard under section 9 of the River and Harbor Act of 1899 as part of the bridge permit. Causeways and approach fills are not included in this nationwide permit and will require an individual or regional Section 404 permit.

(16) Return water [5] from a contained dredged material disposal area provid-

[4] District Engineers are authorized, where regional conditions indicate the need, to define the term "expected high flows" for the purpose of establishing applicability of this nationwide permit.

[5] The return water or runoff from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(j) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This na-

Continued

ed the State has issued a certification under section 401 of the Clean Water Act (see 33 CFR 325.2(b)(1)). The dredging itself requires a Section 10 permit if located in navigable waters of the United States.

(17) Fills associated with small hydropower projects at existing reservoirs where the project which includes the fill is licensed by the Federal Energy Regulatory Commission under the Federal Power Act of 1920, as amended; has a total generating capacity of not more than 1500 kw (2,000 horsepower); qualifies for the short-form licensing procedures of the Federal Energy Regulatory Commission (see 18 CFR 4.61); and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment are minimal in accordance with § 330.7 (c)(2) and (d).

(18) Discharges of dredged or fill material into waters of the United States that do not exceed ten cubic yards as part of a single and complete project provided no material is placed in wetlands [6]

(19) Dredging of no more than ten cubic yards from navigable waters of the United States as part of a single and complete project.[6]

(20) Structures, work and discharges for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan provided the Regional Response Team which is activated under the Plan concurs with the proposed containment and cleanup action.

(21) Structures, works, and discharges associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977; the appropriate district engineer is given the opportunity to review the Title V permit application and all relevant Office of Surface Mining or state (as the case may be) documentation prior to any decision on that application; and the district or division engineer makes a determination that the individual and cumulative adverse effects on the environment from such structures, work, or discharges are minimal in accordance with § 330.7 (c)(2) and (3) and (d).

(22) Minor work or temporary structures required for the removal of wrecked, abandoned, or disabled vessels or the removal of obstructions to navigation.

(23) Activities, work, and discharges undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another federal agency or department where that agency or department has determined, pursuant to the CEQ Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 *et seq.*), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: DAEN-CWO-N) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this nationwide permit of any agency's categorical exclusions, the Chief of Engineers will solicit comments through publication in the FEDERAL REGISTER.

(24) Any activity permitted by a state administering its own permit program for the discharge of dredged or fill material authorized at 33 U.S.C. 1344(g)–(1) shall be permitted pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. Part 403). Those activities which do not in-

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tionwide permit satisfies the technical requirement for a Section 404 for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures.

[6] These nationwide permits are designed for very minor dredge and fill activities such as the removal of a small shoal in a boat slip; they cannot be used for piecemeal dredge and fill activities.

[7] The State of Wisconsin has denied water quality certifications pursuant to Section 401 of the Clean Water Act for these two nationwide permits. Consequently, the permits do not apply in Wisconsin.

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§ 330.7 of this part.

(i) Non-tidal rivers,
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above the headwaters.

(ii) Other non-tidal
United States, includin
lands, that are not pa
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(b) *Conditions.* The fo
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valid:

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(2) That any discharg
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to a shellfish harvesti
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(3) That the activity
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volve a Section 404 state permit are not included in this nationwide permit but many will be exempted by Sec. 154 of Pub. L. 94-587. (See 33 CFR 322.2(a)(2)).

(25) Discharge of concrete into tightly sealed forms or cells where the concrete is used as a structural member which would not otherwise be subject to Clean Water Act jurisdiction.

(26) Discharges of dredged or fill material into the waters listed in paragraphs (a)(26) (i) and (ii) of this section except those which cause the loss or substantial adverse modification of 10 acres or more of waters of the United States, including wetlands. For discharges which cause the loss or substantial adverse modification of 1 to 10 acres of such waters, including wetlands, notification of the district engineer is required in accordance with § 330.7 of this part.

(i) Non-tidal rivers, streams, and their lakes and impoundments, including adjacent wetlands, that are located above the headwaters.

(ii) Other non-tidal waters of the United States, including adjacent wetlands, that are not part of a surface tributary system to interstate waters or navigable waters of the United States (i.e., isolated waters).

(b) *Conditions.* The following special conditions must be followed in order for the nationwide permits identified in paragraph (a) of this section to be valid:

(1) That any discharge of dredged or fill material will not occur in the proximity of a public water supply intake;

(2) That any discharge of dredged or fill material will not occur in areas of concentrated shellfish production unless the discharge is directly related to a shellfish harvesting activity authorized by paragraph (a)(4) of this section.

(3) That the activity will not jeopardize a threatened or endangered species as identified under the Endangered Species Act, or destroy or adversely modify the critical habitat of such species. In the case of Federal agencies, it is the agencies' responsibility to review its activities to determine if the action "may affect" any listed species or critical habitat. If so, the Federal agency must consult with the Fish and Wildlife Service and/or National Marine Fisheries Service;

(4) That the activity will not significantly disrupt the movement of those species of aquatic life indigenous to the waterbody (unless the primary purpose of the fill is to impound water);

(5) That any discharge of dredged or fill material will consist of suitable material free from toxic pollutants (See section 307 of Clean Water Act) in toxic amounts;

(6) That any structure or fill authorized will be properly maintained;

(7) That the activity will not occur in a component of the National Wild and Scenic River System; and

(8) That the activity will not cause an unacceptable interference with navigation.

(9) That the best management practices listed in § 330.6 of this part should be followed to the maximum extent practicable.

(c) *Grandfathering.* (1) Discharges previously authorized by the nationwide permits (§ 330.4(a) (1) and (2) of the July 22, 1982, Interim Final Regulation) modified and reissued at paragraph (a)(26) of this section continue to be authorized by those nationwide permits for 18 months from the effective date of this regulation if:

(i) The discharge was commenced or under contract to commence by the effective date of this regulation *or*

(ii) The permittee had;

(A) By March 29, 1984, received written confirmation from the Corps stating that the Corps considered the specific discharge in question and determined it was previously authorized by the nationwide permits modified and reissued at paragraph (a)(26) of this section; *and*

(B) By the effective date of this regulation, obtained all necessary pre-discharge approvals or permits required by federal, state or local laws or regulations.

(2) Permitting discharging under paragraph (c)(1) of this section must provide documents demonstrating compliance to the district engineer within 60 days of the effective date of this regulation. These documents will become a part of the public record. The district engineer will notify such

permittees whether they meet the criteria of paragraph (c)(1) of this section within 15 days of receipt of such documents.

(3) If a permittee cannot meet the criteria of paragraph (c)(1) of this section, but can otherwise demonstrate to the district engineer within 60 days of the effective date of this regulation, investments made toward the discharge in reliance on the previous authorizations of the nationwide permits modified and reissued at paragraph (a)(26) of this section which cannot be modified to comply with 33 CFR Parts 320 through 330 without substantial loss to the permittee, then the district engineer may allow the discharge to proceed for 18 months from the effective date of this regulation if and when he determines the discharge complies with the Section 404(b)(1) guidelines.

(4) After 18 months from the effective date of this regulation, the permittee must follow 33 CFR Parts 320 through 330 for any new or remaining discharges.

(5) This section shall not set aside, alter, prevent or affect any past, present, or future assertion of the division engineer's authority to require an individual permit under either § 330.7 of the July 22, 1982, Interim Final Regulation (47 FR 31794) or § 330.8 of this part.

[47 FR 31831, July 22, 1982, as amended at 49 FR 39483, Oct. 5, 1984; 49 FR 39843, Oct. 11, 1984]

§ 330.6 Management practices.

(a) In addition to the conditions specified in §§ 330.4 and 330.5 of this part, the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material under nationwide permits in order to minimize the adverse effects of these discharges on the aquatic environment. Failure to comply with these practices may be cause for the district engineer to recommend or the division engineer to take discretionary authority to regulate the activity on an individual or regional basis pursuant to § 330.7 of this part.

(1) Discharges of dredged or fill material into waters of the United States shall be avoided or minimized through the use of other practical alternatives.

(2) Discharges in spawning areas during spawning seasons shall be avoided.

(3) Discharges shall not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the water (unless the primary purpose of the fill is to impound waters).

(4) If the discharge creates an impoundment of water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, shall be minimized.

(5) Discharge in wetlands areas shall be avoided.

(6) Heavy equipment working in wetlands shall be placed on mats.

(7) Discharges into breeding areas for migratory waterfowl shall be avoided.

(8) All temporary fills shall be removed in their entirety.

§ 330.7 Notification procedures.

(a) The general permittee shall not begin discharges requiring pre-discharge notification pursuant to the nationwide permit at § 330.5(a)(26):

(1) Until notified by the district engineer that the work may proceed under the nationwide permit with any special conditions imposed by the district or division engineer; or

(2) If notified by the district or division engineer that an individual permit may be required; or

(3) Unless 20 days have passed from receipt of the notification by the district engineer and no notice has been received from the district or division engineer.

(b) Notification pursuant to the nationwide permit at § 330.5(a)(26) must be in writing and include the information listed below. Notification is not an admission that the proposed work would result in more than minimal impacts to waters of the United States; it simply allows the district or division engineer to evaluate specific activities for compliance with general permit criteria.

(1) Name, address, a
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(3) Brief description of th
work, its purpose, and th
mate size of the waters, inc
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the work; and
(4) Any specific infor
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(c) *District engineer revie*
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al Director, National Mari
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ate state natural resource
being of particular intere
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charge has not been previ
fied but he believes it ma
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the division engineer and t
appropriate staff official
agencies to afford those
adequate opportunity befo
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to the district engineer
whether individual permit
required.
(2) If the nationwi
§ 330.5(a) (7), (17), or (21)
and the Environmental
Agency, the Fish and Wil
the National Marine Fish
or the appropriate state
source or water quality
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(1) Name, address, and phone number of the general permittee;

(2) Location of the planned work;

(3) Brief description of the proposed work, its purpose, and the approximate size of the waters, including wetlands, which would be lost or substantially adversely modified as a result of the work; and

(4) Any specific information required by the nationwide permit and any other information that the permittee believes is appropriate.

(c) *District engineer review of notification.* Upon receipt of notification, the district engineer will promptly review the general permittee's notification to determine which of the following procedures should be followed:

(1) If the nationwide permit at § 330.5(a)(26) is involved and the district engineer determines either:

(i) The proposed activity falls within a class of discharges or will occur in a category of waters which has been previously identified by the Regional Administrator, Environmental Protection Agency; the Regional Director, Fish and Wildlife Service; the Regional Director, National Marine Fisheries Service; or the heads of the appropriate state natural resource agencies as being of particular interest to those agencies; or (ii) the particular discharge has not been previously identified but he believes it may be of importance to those agencies, he will promptly forward the notification to the division engineer and the head and appropriate staff officials of those agencies to afford those agencies an adequate opportunity before such discharge occurs to consider such notification and express their views, if any, to the district engineer concerning whether individual permits should be required.

(2) If the nationwide permits § 330.5(a) (7), (17), or (21) are involved and the Environmental Protection Agency, the Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate state natural resource or water quality agencies forward concerns to the district engineer, he will forward those concerns to the division engineer together with a statement of the factors pertinent to a determination of the environmental effects of the proposed discharges, including those set forth in the 404(b)(1) guidelines, and his views on the specific points raised by those agencies.

(3) If the nationwide permit at § 330.5(a)(21) is involved the district engineer will give notice to the Environmental Protection Agency and the appropriate state water quality agency. This notice will include as a minimum the information required by paragraph (b) of this section.

(d) *Division engineer review of notification.* The division engineer will review all notifications referred to him in accordance with paragraph (c)(1) or (c)(2) of this section. The division engineer will require an individual permit when he determines that an activity does not comply with the terms or conditions of a nationwide permit or does not meet the definition of a general permit (see 33 CFR 322.2(f) and 323.2(n)) including discharges under the nationwide permit at § 330.5(a)(26) which have more than minimal adverse environmental effects on the aquatic environment when viewed either cumulatively or separately. In reaching his decision, he will review factors pertinent to a determination of the environmental effects of the proposed discharge, including those set forth in the 404(b)(1) guidelines, and will give full consideration to the views, if any, of the federal and state natural resource agencies identified in paragraph (c) of this section. If the division engineer decides that an individual permit is not required, and a federal or appropriate state natural resource agency has indicated in writing that an activity may result in more than minimal adverse environmental impacts, he will prepare a written statement, available to the public on request, which sets forth his response to the specific points raised by the commenting agency. When the division engineer reaches his decision he will notify the district engineer, who will immediately notify the general permittee of the division engineer's decision.

[49 FR 39484, Oct. 5, 1984]

§ 330.8 Discretionary authority.

Except as provided in paragraph (d) of this section, division engineers on their own initiative or upon recommendation of a district engineer are authorized to modify nationwide permits by adding regional conditions or to override nationwide permits by requiring individual permit applications on a case-by-case basis. Discretionary authority will be based on concerns for the aquatic environment as expressed in the guidelines published by EPA pursuant to section 404(b)(1). (40 CFR Part 230)

(a) *Regional conditions.* Division engineers are authorized to modify nationwide permits by adding conditions applicable to certain activities or specific geographic areas within their divisions. In developing regional conditions, division and district engineers will follow standard permit processing procedures as prescribed in 33 CFR Part 325 applying the evaluation criteria of 33 CFR Part 320 and appropriate parts of 33 CFR Parts 321, 322, 323, and 324. A copy of the Statement of Findings will be forwarded to the Office of the Chief of Engineers, ATTN: DAEN-CWO-N. Division and district engineers will take appropriate measures to inform the public at large of the additional conditions.

(b) *Individual permits.* In nationwide permit cases where additional regional conditioning may not be sufficient or where there is not sufficient time to develop regional conditions under paragraph (a) of this section, the division engineer may require individual permit applications on a case-by-case basis. Where time is of the essence, the district engineer may telephonically recommend that the division engineer assert discretionary authority to require an individual permit application for a specific activity. If the division engineer concurs, he may verbally authorize the district engineer to implement that authority. Both actions will be followed by written confirmation with copy to the Chief of Engineers (DAEN-CWO-N). Additionally, after notice and opportunity for public hearing, division engineers may recommend to the Chief of Engineers that individual permit applications be required for categories of activities, or in a specific geographic area. The division engineer will announce the decision to persons affected by the action. The district engineer will then regulate the activity or activities by processing an application(s) for individual permit(s) pursuant to 33 CFR Part 325.

(c) Discretionary authority which has been exercised under nationwide permits issued on 19 July 1977 expires four months from the effective date of this regulation. Such authority may be extended or reinstated after appropriate procedures of this regulation and 33 CFR Parts 320 through 325 have been followed.

(d) For the nationwide permit found at § 330.5(a)(26), after the applicable provisions of § 330.7(a) (1) and (3) have been satisfied, the permittee's right to proceed under the general permit may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 325.7.

[47 FR 31831, July 22, 1982. Redesignated and amended at 49 FR 39484, Oct. 5, 1984]

§ 330.9 Expiration of nationwide permits.

The Chief of Engineers will review nationwide permits at least every five years. Based on this review, which will include public notice and opportunity for public hearing through publication in the FEDERAL REGISTER, he will either modify, reissue (extend) or revoke the permits. If a nationwide permit is not modified or reissued within five years of publication in the FEDERAL REGISTER, it automatically expires and becomes null and void.

[47 FR 31831, July 22, 1982. Redesignated at 49 FR 39484, Oct. 5, 1984]

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

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